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Supreme Court of the United States

October Term, 1975

No. 75-224

THE VILLAGE VOICE, INC., and
SCALI, McCABE, SLOVES, INC.,
Petitioners,

v.

DOMINIC S. RINALDI,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department

REPLY BRIEF FOR PETITIONERS

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Statement

The petition showed that the decision below conflicts with the holding of *Bigelow* v. *Virginia*, 44 L.Ed.2d 600 (1975), and either misperceives or misapplies the knowing or reckless falsity test. At a minimum, therefore, the petition should be granted and the case remanded to the court below for reconsideration in light of *Bigelow*.

Respondent's brief in opposition is in large part a collection of irrelevant, unsupported, and erroneous assertions, based on material outside the record below, most of which need not concern us here. In view of respondent's charges, however—particularly the charge that the petition erred in stating that the advertisement in suit was based on the August 31 article in *The Village Voice*—an elaboration of the subject matter of that advertisement is appropriate.

On August 31, 1972, *The Village Voice* published an expose of judicial leniency toward heroin dealers. That article, based in part upon original investigation by Jack Newfield and in part upon material Newfield obtained from files of the New York Joint Legislative Committee on Crime, prominently described the arraignment, before respondent Justice Rinaldi, of Norman Burton, who had been charged with attempting to bribe a police officer after arrests for heroin sales. In discussing Burton's arraignment before respondent on the attempted bribery charge, the article noted that respondent released Burton without bail and described in detail the respondent's harsh rebuke to the arresting officer in open court.[1]

1. The article (Appendix A, *infra*, p. 1a) also discussed the sentence respondent imposed in *People* v. *Glover*, a case which was the subject of the legislative committee hearings, and in which defendant received a conditional discharge upon his plea of guilty to a "Class C" felony (a sentence which respondent acknowledged, during discovery proceedings below, was "illegal"). Parenthetically, on June 16, 1972, the day after the hearings, the *New York Daily News*, in an article entitled "State Probers Put Spotlight on 4 Justices," cited respondent as one of the judges who "handed down wrist-slap sentences in felony narcotics cases" and, on the following day, that newspaper published an editorial calling for the convening of the Court on the Judiciary—the court with power to remove judges—to review the four cases of "alleged judicial misconduct" (R. 91-92).

On February 25, 1973, the advertisement which is the subject matter of this suit was published (Petition, Appendix D, p. 14a). By its terms, the advertisement is based upon the August 31 article.[2] Most of the portion of that advertisement relevant to respondent is nothing more than a summary of the *Burton* arraignment as described in the August 31 article. Indeed, except for explicit references in the advertisement to later articles in the *New York Times* and *New York Magazine*, the *only* factual statements in the advertisement concerning respondent are statements about the *Burton* arraignment taken from the August 31 article, including the "strange" behavior of respondent, who released without bail a heroin dealer (Burton) with a long record of arrests and convictions, and then, curiously, "yelled at and humiliated" the arresting officer. The remainder of the advertisement, insofar as it concerns respondent at all, either expressly refers to (i) subsequent reports of *The New York Times* or *New York Magazine*, (ii) opinions and conclusions concerning respondent's behavior ("curiously lenient," "very tough") which manifestly may be drawn from the *New York Times* study (whose accuracy is not in issue here) and (iii) accurate descriptions of the methods by which the citizenry might remove "questionable" judges.

Accordingly, the petition stated that the advertisement in suit was based upon the August 31 article; and,

2. "We broke Jack Newfield's story in August, several weeks before any other publication." (Petition, Appendix D, p. 14a)

notwithstanding respondent's assertion to the contrary (Respondent's Brief, p. 13), that is the fact.[3]

Thus, insofar as respondent in this case intends to challenge the factual statements in the advertisement—as opposed to mere opinions and conclusions, which are absolutely beyond the ken of the law of defamation as it relates to public officials[4]—respondent's challenge must be to the statements concerning the *Burton* arraignment contained in the advertisement. And insofar as respondent claims that the allegedly defamatory material was published with knowing or reckless disregard of its falsity, his claim must relate to those same factual assertions.

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3. The headline ("The judge bawled out the cop. And let the pusher go free.") plainly refers to the *Burton* arraignment described in the text, and not some other article as respondent asserts (Respondent's Brief, p. 13). Furthermore, respondent's statement (Brief, p. 12) that the story of the *Burton* arraignment was repeated in an October 12 article in the *Voice* (and thus that the advertisement is based upon the October 12 article) is not correct: the October 12 article (Appendix B, *infra*, p. 5a) simply made a passing reference to the fact that an article concerning Burton had appeared in the August 31 edition of the *Voice*. Finally, respondent's statements that the opinions or characterizations quoted in the text—"curiously lenient" and "tough"—are taken from the October 12 *Voice* article and a *New York Magazine* article ignores the fact that those opinions and characterizations are just that, opinions and characterizations. An examination of the *New York Times* article (Appendix C, *infra*, p. 13a) shows that those characterizations are perfectly proper conclusions based upon the facts set forth in the indisputably accurate *Times* article and the undisputed facts concerning the *Burton* arraignment.

4. As this Court recently stated: "Under the First Amendment, there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the consciences of judges and juries, but on the competition of other ideas." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974).

ARGUMENT

I

The judgment below meets the applicable tests of finality.

For the reasons set out at pages 2-5 of the petition, this case meets the tests of finality in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974), and the other cases cited.

Respondent's argument that there is no finality is erroneous for two reasons: First, if we are correct in our argument that there has not been a constitutionally adequate showing of malice, then petitioners would be entitled to summary judgment and, contrary to respondent's argument, no further proceedings in the state court should ensue. Second, the portion of the decision below holding that advertisements are wholly outside the scope of the First Amendment is squarely contrary to *Bigelow* v. *Virginia*, 44 L.Ed.2d 600 (1975). Such a decision, if now allowed to stand unmodified, would necessarily, but improperly, protract any subsequent proceedings in this case, and would chill criticism of public officials by other New York newspapers.

II

This is not a "false advertising" case.

Respondent argues that because he claims the advertisement falsely defames him, the advertisement is entirely without First Amendment protection. "False advertising," he asserts, is beyond the scope of the First Amendment.

This is not, however, a false advertising case; and thus the authorities relied upon by respondent are inapposite. It is not contended, for example, that the advertisement falsely informs readers of the price of the newspaper advertised. Nor is it contended that the solicitation of subscriptions is fraudulent in that the subscriber would not receive the issues of the newspaper provided in the subscription form. And, most importantly, it is undisputed that the advertisement in suit *accurately* portrays material previously published in the newspaper being advertised, *The Village Voice*.

The present controversy, therefore, does not concern false advertising; it concerns, rather, the constitutional standards to be applied in defamation actions brought by public officials in response to press criticism. Specifically, the action raises the questions whether, and if so to what extent, those standards change when the press advertises its criticism of the official.

We submit that under the principles of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and *Bigelow* v. *Virginia*, 44 L.Ed.2d 600 (1975), a public official who claims to

have been defamed by a press advertisement criticizing his conduct in office must meet the *Times* standard of knowing or reckless falsity.

Therefore, the court below erred, first of all, in its holding that the advertisement in suit is not entitled to *any* First Amendment protection.

III

There has been no constitutionally adequate showing of knowing or reckless falsity.

The second major error committed by the court below was its application of a constitutionally inadequate standard of knowing or reckless falsity in denying summary judgment to petitioners.

This action, it is worth repeating, is based solely upon the advertisement in suit and not upon the array of other articles and statements—in the *Voice* and in other publications—about which respondent indiscriminately complains in his brief in opposition. The numerous statements in various articles which respondent quotes and attacks in his brief do not appear in the advertisement in suit and are therefore not pertinent here.

As set forth at pages 11-14 of the petition, to prevail—or even to put petitioners to the burden of a trial—respondent must show evidence that the statements *in the advertisement* were knowingly or recklessly false. He has not done so:

(1) Respondent relies—and the court below apparently relied *exclusively*[5]—upon an October 16, 1972 letter from Edward J. Connolly to the *Voice*. But the Connolly letter is no evidence whatsoever that the statements in the *advertisement* were published with knowing or reckless falsity. The Connolly letter, by its terms, challenges only the factual assertions in an October 12 *Voice* article—an article that dealt not with respondent's handling of the *Burton* case, which the advertisement in suit described, but of two other cases (*People* v. *Vario* and *People* v. *Agro*) which the advertisement did not describe.[6]

Therefore, the Connolly letter could not have put the *Voice* on notice that the factual statements in the *advertisement* were false. If, as respondent asserts (and the court below apparently accepted), the Connolly letter created some duty of inquiry on the part of the *Voice*, such a duty would have related solely to the *Voice's* published statements about *Vario* and *Agro* in the October 12 article, not about *Burton*.

Moreover, the Connolly letter was extremely broad and vague, and thus it could not as a constitutional matter have created a duty of inquiry of *any* kind: "[M]ere proof of

5. The decision below virtually quoted from the Connolly letter word for word: Connolly wrote that an October 12, 1972 *Voice* article contained facts which "are inaccurate, incomplete and in many cases are totally incorrect" (Petition, Appendix E, p. 16a). The court below denied summary judgment in part because the *Voice* received information from "an apparently reliable source" (not *sources*) that its original publication was "inaccurate, incomplete, and in many respects totally false" (Petition, Appendix A, p. 3a).

6. As noted above (p. 4), the October 12 *Voice* article, although it briefly alludes to *Burton*, does not—as respondent asserts in his brief—repeat the facts concerning *Burton*.

failure to investigate, without more, cannot establish reckless disregard for the truth." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 332 (1974).

(2) Respondent next relies (Brief, p. 14) upon an October 12, 1972 letter to *New York Magazine* from Joseph Morello as evidence of the *Voice's* malice. Morello wrote that the assistant district attorney had consented to the release of Burton without bail, and that this fact should have been stated in the description of the *Burton* arraignment in Newfield's *New York Magazine* article. Respondent's reliance on the Morello letter as evidence of malice is misplaced. It ignores: (i) the fact that *New York Magazine* published, with the Morello letter, a reply from Newfield indicating his belief (although erroneous) that the district attorney *opposed* respondent's release of Burton without bail;[8] and (ii) that the *Voice* advertisement does not contain any reference to the prosecutor's role at the arraignment.

At most, respondent's contentions come down to a claim that the August 31 article, and derivatively the advertisement in suit, should have mentioned the prosecutor's consent to parole. But even if the August 31 article should have included mention of that consent (had the *Voice* known of the consent when the article was published), it does not follow that a brief summary of the article, such as that contained in the advertisement, need also have included

8. Newfield was informed by the bureau chief in the District Attorney's office in charge of the case that his office had sought bail on Burton's arraignment; Newfield therefore discounted Morello's contrary assertion (R. 410). It was only after this litigation commenced that Newfield and petitioners learned for the first time that, because of an administrative error at the District Attorney's office its recommendation was not communicated to the assistant district attorney who appeared at Burton's arraignment and that the assistant district attorney in fact acquiesced to respondent's suggestion that Burton be released without bail.

that fact. It is a matter of editorial judgment whether or not the prosecutor's position should have been discussed in the article. Even more clearly, in any brief summary of the article, an exercise of editorial judgment to omit such a fact is proper. Under *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241, 258 (1974), it is submitted that such an omission is at best a question of "[t]he choice of material to go into a newspaper and the decisions made as to . . . treatment of public issues and public officials—whether fair or unfair—[which] constitutes the exercise of editorial control and judgment," and accordingly cannot form the basis for a finding of knowing or reckless falsity.

(3) Finally, respondent for the first time raises in this Court portions of a report by the Association of the Bar of the City of New York (Respondent's Brief, Appendix B). But that report was not before the court below and could not have been the basis for that court's determination; hence, that report cannot be relevant in determining the correctness of the standard of knowing or reckless falsity applied below. More importantly, that report has no bearing on the issue of whether the advertisement in suit was published with knowing or reckless falsity because there is no evidence that the contents of that report were made known to petitioners prior to publication of the advertisement in suit. Respondent's brief baldly asserts (p. 16) that the report proves that on December 28, 1972, prior to publication of the advertisement, Newfield was told (and thus the *Voice* by imputation knew) that he had omitted certain "essential facts" from his *New York Magazine* article. In fact, the report says nothing more than that representatives of the Bar Association met with Newfield and

his counsel on December 28, 1972. (Respondent's Brief, Appendix B, p. 4a).[7]

In sum, respondent did not adduce any evidence of reckless or knowing falsity, and thus the court below applied a constitutionally impermissible standard—whatever that unarticulated standard was—in finding the contrary.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be granted and the case set down for argument. In the alternative, the petition should be granted and the case remanded to the Appellate Division for further consideration in the light of *Bigelow* v. *Virginia,* 44 L.Ed. 2d 600 (1975).

Respectfully submitted.

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7. Since respondent has chosen to go outside the record to deal with excerpts of the City Bar Association report, we would point out that the entire report concluded that Mr. Newfield's criticisms of the eight State Supreme Court Justices reviewed were confirmed by its investigation, in at least substantial part, as to five of them. Subsequently, one of the justices resigned, and removal proceedings are pending with respect to one other. In 1973, respondent Rinaldi was indicted by a grand jury on five felony counts relating to his judicial conduct, although not involving the cases reported in *The Village Voice* and *The New York Times* in 1972; two of these counts were ultimately dismissed and respondent was tried and acquitted on the remaining counts in 1974.

APPENDIX

APPENDIX A

THE *VILLAGE VOICE* ARTICLE AUGUST 31, 1972

Norman Burton is a heroin dealer in the asphalt colony called Bedford-Stuyvesant. On a good day he will sell $4000 worth of junk out of the brownstone he owns at 553A Monroe Street.

Three weeks ago, on August 8, Burton was in court. It was his 18th arrest. His five-page yellow sheet showed convictions for selling heroin, check forgery, and assault. On this occasion he was charged with selling heroin and bribing a policeman; he had offered the arresting officer $1000, and it was recorded on tape.

But Norman Burton was released without bail. He may now be back on the mean streets of Bed-Stuy selling junk to 12-year-olds. The judge who let Burton go without any bail was Dominic Rinaldi, a Justice in Brooklyn Supreme Court.

This was not the first time Judge Rinaldi has let a heroin dealer go free. He has a reputation among lawyers and court reformers for going soft on pushers, especially when they are represented by certain well-connected bail bondsmen and lawyers.

On June 15 of this year, at a public hearing of the Joint Legislative Committee on Crime, Rinaldi was one of four city judges named publicly as being suspiciously lenient in felony narcotics cases.

Dominic Rinaldi is a loyal part of the Brooklyn political machine. He is especially close to James Mangano, who is a district leader and the chief clerk of Brooklyn Supreme Court, and who for 20 years has been a great conservative power in borough politics. His son, Guy Mangano, is also a Brooklyn Supreme Court Judge.

Despite his kindness to big heroin dealers, Rinaldi has displayed little compassion when it comes to youthful offenders, bail for poor people, or inmate rights. He has also been more anxious to sentence young drug addicts to the dungeon of Rikers Island, than to put them in narcotics treatment programs.

Says a wise political lawyer: "Compared with the good Supreme Court Judges in Brooklyn, compared with Thomas Jones, or Irwin Brownstein, or Abe Kalina,

Rinaldi is totally insensitive to civil liberties."

• • •

Last Saturday Billy David asked about the Burton case in Bed-Stuy's old, run-down 79th Precinct, at the corner of Gates and Throop. David is a black, plainclothes anti-crime cop, specializing in narcotics. He made the arrest of Burton.

"We were trying to get Norman for a month. I had arrested him once before, as he was selling a $5 bag to a 12-year-old boy. Once we staked out his house and watched 75 people buy drugs from him in two hours. I watched college girls drive up in VWs and buy heroin from him. Anyway, the first time we arrested him, he was given only $1500 bail, and he had that much in cash on him.

"It was hard to bust Norman because he almost never leaves his house, and we knew he carried a gun. We finally got him as he was bringing back 25 decks of heroin from his supplier. . . .

"A few days later, I received word that Norman wanted to see me and make a deal. I reported this to the Police Department's internal affairs division, and they had me wear a wire (concealed tape recorder) when I met with Norman.

"When I saw him, Norman offered me $1000 to drop the case by not showing up in court. At that point I arrested him for bribery."

Norman Burton's arraignment was on August 8 in Brooklyn. Billy David decided to go to the hearing because he was curious how Norman managed to get such low bail the last time.

In the middle of the hearing, Judge Rinaldi was told by Norman's lawyer that David was in the courtroom, and Rinaldi ordered David to the bench.

"The judge started to yell at me," David recalls. "He asked me what was I doing there, and then he asked me three times what bail should he set for Norman. I felt humiliated. I felt that I was nothing. The judge was yelling at me, and Norman was watching, and other defendants were watching. I couldn't even talk I felt so bad. Then Judge Rinaldi let Norman off with no bail. He paroled him in his own custody. I will never forget the tone of contempt in Rinaldi's voice as he was yelling at me. The other guy was selling heroin to children and I was being treated as the criminal."

David's commanding officer, Sergeant Tom Santise, was "outraged" when he learned what happened in court. He filed an immediate complaint with Inspector Eli Lazarus of the Criminal Justice Bureau. He also called the Brooklyn D. A.'s office to express his dismay. The D. A.'s office reassured Santise there was nothing improper about David's presence in the courtroom at the arraignment.

• • •

The Joint Legislative Committee on Crime, chaired by Republican State Senator John Hughes of Syracuse, has been investigating felony narcotics cases (a felony is possession of more than a pound of hard drugs) in which dealers have escaped jail sentences. The committee has a file on Judge Rinaldi.

Clifton Glover is a heroin dealer on about the same scale of operation as Norman Burton—considerably above the typical street corner addict-pusher. Glover was

arrested on May 20, 1970, in Brooklyn for selling narcotics. An undercover cop made a buy and then arrested Glover. Glover had on him two ounces of heroin, almost a pound of cocaine, and a loaded gun. He had two prior arrests for selling drugs, and was free on bail at the time of his arrest.

On October 28, 1970, Clifton appeared before Judge Rinaldi. He pleaded guilty, and received a conditional discharge—no sentence. He could have received up to 25 years. According to John O'Connor, the executive director of the Joint Committee on Crime, "a conditional discharge for a C felony is prohibited under the state's penal law."

In December 1971, the Joint Committee released a study of court dispositions of felony narcotics cases. The study revealed that in Brooklyn only six per cent of major narcotics dealers are sentenced to a year or more in prison. This compares with 31 per cent in the Bronx and 28 per cent in Queens. The same survey disclosed that 42 per cent of felony narcotics cases in Brooklyn were dismissed, compared with only 15 per cent in the Bronx.

• • •

Two related poisons are eating away at New York—the plague of heroin, and the corruption of the criminal justice system caused by the billion dollar economy of junk. After reading the Joint Crime Committee's studies, and the State Commission of Investigation's annual report released two weeks ago, it seems clear that the most dangerous corrupters of justice in this town are not the cops on the beat, but those who are more powerful and respectable—the judges and the prosecutors.

The State Commission's report devoted 32 pages to describing how the Queens District Attorney's office and Judge Albert Bosch let a heroin dealer plead guilty to a misdemeanor and go free.

Heroin kills. It causes crime, it destroys neighborhoods, it makes citizens flee to the suburbs or live in fear behind triple locks. A child a week dies in this city because of the negligence of drug-addicted parents. Eighty per cent of the inmates in the over-crowded Tombs are junkies. More than half the 58 homicides during the week of July 14 involved heroin. The economy of junk is what organized crime is all about. And the immense profits of heroin corrupt the rule of law itself.

There are at least 250,000 heroin addicts in New York City. Nobody knows for sure, just as nobody knows for sure exactly how many rats are in the slums. It is estimated by Max Singer of the Hudson Institute that in New York State addicts steal a half billion dollars annually to maintain their habits.

So what Judge Rinaldi is doing is no small thing. He is putting people on the street who sell death for a profit. Just look at Fox Street in the South Bronx, or Myrtle Avenue in Bed-Stuy, and you can see the process of generational genocide caused by heroin. Ten-year-olds dead of ODs in abandoned buildings and alleys. Storekeepers murdered by addicts desperate for a fix. Old junkies dead at 30 with no veins left.

Thanks to David Durk, Frank Serpico, David Burnham, and the Knapp Commission, police corruption has been exposed to public scrutiny. Norman Burton was not just a heroin dealer. He tried to bribe a cop, and the cop reported it, and took some risk to make an additional arrest for bribery. What Billy David did was exemplary. But Judge Rinaldi abused him and let the briber go free. What effect will the example set by Judge Rinaldi have on cynical cops tempted by graft?

Billy David is not affluent. He lives in Canarsie and probably earns less money than most readers of The Voice. Norman Burton, the dealer, probably makes $100,000 a year; he owns two houses. Billy David should have been honored for arresting Norman Burton. Instead Judge Rinaldi made him feel like a criminal.

Billy David and other good cops are society's garbagemen. They do the shit work and take risks no one else wants. Billy David isn't responsible for the poverty and violence of Bedford-Stuyvesant. He didn't build the rotten housing, or cause the unemployment, or bring in all the narcotics and knives, or spread the veneral diseases, or breed the rats. He didn't build Bedford-Stuyvesant; the banks, and the real estate speculators, and the politicians did that. Billy David just goes out every night and tries to protect people from muggers and robbers, and tries to lock up the heroin dealers.

Unlike most of us, he gets to see the victims—the pain of a mother whose son is strung out on junk, the old person killed for $2, a welfare recipient whose check has been stolen, the ODs still in public school. And in the 79th Precinct all the victims are black.

* * *

Nobody judges the judges. A Supreme Court Justice like Dominic Rinaldi is literally beyond the law. He is a king without accountability. As long as he pleases James Mangano, he will remain a judge. And you and I will have to stand in respect every time he enters and leaves his courtroom.

APPENDIX B

THE *VILLAGE VOICE* ARTICLE OCTOBER 12, 1972

During the last 18 months, five criminal indictments against Mafia members in Brooklyn have been thrown out of court by the trial judge. All five were later unanimously reinstated by the Appellate Division. And all five dismissals were ordered by the same Brooklyn Supreme Court Justice —Joseph Corso.

Joseph Caruso, an alleged soldier in the Carlo Gambino Mafia family, was indicted for contempt in Brooklyn. On March 1, 1971, Caruso pleaded guilty before Judge Corso. On September 29, 1971, in a highly unusual procedure, Judge Corso permitted Caruso to change his mind, withdraw his plea, and then dismissed the indictment against him. On June 12, 1972, the Appellate Division reversed Corso's decision in a 5-0 ruling.

On September 15, 1972, Judge Corso set Caruso plead guilty again, and fined him $500. According to a witness in court that day: "By the time Corso said the word 'five,' Caruso had the money, five new $100 bills, out of his pocket, and handed it over."

Vincent De Cicco, listed by police as a button man for the Gambino family, was convicted of contempt of a Brooklyn grand jury on September 24, 1971. Judge Corso threw out the jury's verdict and dismissed the indictment. To his considerable credit, Brooklyn District Attorney Eugene Gold appealed Corso's ruling, as he appealed all five of these curious Corso dismissals. And the Appellate Division unanimously reversed Judge Corso, restoring the guilty decision and reinstating the original indictment.

On June 1, 1972, De Cicco came before Judge Corso for sentencing. Prior to the sentencing date, Brooklyn D. A. Gold sent Judge Corso a written recommendation from the Probation Department that the defendant be sentenced to the maximum, a year in jail, based partly on the fact that De Cicco's criminal record began in 1931 and included a conviction for robbery. But Judge Corso imposed only a three-month sentence.

In this case Judge Corso admits he spoke to the Probation Department and says he was given a recommendation fr a more lenient ntence. But Judge Corso has refused to say who in the Probation Department he spoke to. And a Probation Department employe told me: "I don't believe anyone here would have recommended leniency for a guy like De Cicco. We believe Judge Corso asked that the report be changed himself. And although Judge Corso can probably cite some legal justification for his decision, I will always be suspicious of him becase of his special zeal in this case. He went out of his way to help De Cicco."

Bruno Capio is listed as a soldier in the Bonanno family. His contempt indictment was dismissed by Judge Corso on November 9, 1971, and was reinstated, on the District Attorney's appeal, on April 10, 1972. The case is still pending in the Brooklyn courts.

Aniello Dellacroce is one of the major figures in organized crime, regarded as the underboss of the whole Carlo Gambino family. His contempt indictment was thrown out by Judge Corso on February 2, 1971, and then unanimously reinstated by the Appellate Division on February 7, 1972.

Angelo Sparaco is listed by law enforcement agencies as a capo in the Bonanno family. Judge Corso dismissed his indictment on June 7, 1971, and the Appellate Division unanimously reinsteated the indictment on May 15. 1972. The case is still pending.

Judge Corso's extraordinary permissiveness toward the Mafia is inconsistent with his treatment of other defendants. And inconsistent with his record while he was an assemblyman.

Dan Alterman, an attorney affiliated with the Lawyers Guild, tells this story of his experience before Judge Corso: "I had a client, a black kid, 19 years old. He was in the hospital, on the critical list, as the result of a fight on the street. While he was in the hospital, he obviously was unable to report to his probation officer. We appeared before Judge Corso on a violation of probation charge. Judge Corso wouldn't even listen to us. He told my client, 'You deserve to be put away,' and sent my client back to prison."

Corso's record as an assemblyman is undistinguished, except for one bill he would introduce every session of the legislature. The Corso bill would permit public school teachers to hit students, to use "reasonable force."

In 1957 the bill was vetoed by Governor Harriman, and in 1959 and again in 1960 Corso's corporal punishment bill was killed by Governor Rockefeller, after the New York Board of Education and the Herald Tribune urged its veto.

* * *

The Joint Legislative Committee on Crime, chaired by Republican John Hughes of Syracuse, has been compiling statistics on the quality of justice in the courts. The facts suggest there is something rotten in the judiciary, particularly in Brooklyn.

According to the Hughes Committee's records, Mafia members and big-time heroin dealers are systematically treated more leniently than other defendants.

In New York City, 44.7 per cent of indictments against organized crime figures during the last 10 years were dismissed by State Supreme Court Justices. In contrast, only 11.5 per cent of the indictments against all defendants were dismissed. In 193 cases where Mafiosi were actually convicted by a jury, the study showed that the trial judge let the defendants off with no prison sentence 46 per cent of the time.

Another study prepared by the Hughes Committee staff showed that major heroin dealers are treated more permissively by

judges in Brooklyn than in any other county in the city.

Only six per cent of the heroin dealers charged with a felony (possession of more than a pound of heroin or cocaine) received more than one year in prison from Brooklyn judges. In contrast, 31.6 per cent of the felony heroin defendants in the Bronx were sentenced to more than a year in prison.

Also, 42 per cent of the felony cases against heroin dealers were dismissed by Brooklyn judges, while only 15 per cent of such cases were thrown out by Bronx judges.

The point I'm trying to suggest is definitely not that all judges should become tougher on all defendants. In selected areas—like heroin traffic and organized crime—I think judges should clearly be less permissive. But at the same time, in other areas—sentencing first offenders, considering alternatives to detention, setting bail for poor people, handling addicts who are not large-scale pushers—in these areas, judges should be more flexible and more compassionate. The problem now is that some judges have completely reversed the areas where toughness and sensitivity are required, so that the law has a double standard—one for the underboss of the Carlo Gambino family, and another for a black kid from Bed-Stuy on probation.

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Dominic Rinaldi is another Brooklyn Supreme Court judge with a twisted sense of justice. Six weeks ago I wrote a Voice article describing two cases involving heroin dealers where Judge Rinaldi let them both go free without a jail sentence ("Justice Gets a Fix," Voice, August 31). One dealer had 12 previous arrests and was arrests and was arrested selling to a 12-year-old. The second drug pusher could have gotten 25 years on a C felony, and Judge Rinaldi gave him a conditional discharge.

Two weeks ago in the New York Times, Nicholas Gage reported two other cases where Judge Rinaldi was suspiciously lenient with members of the Mafia. One case involved Paul Vario, a captain in the Mafia family headed by the late Thomas Luchese. Vario had a criminal record dating back to 1925, including a conviction for rape. He was charged with bribery and conspiracy and could have gotten 15 years in jail. But Judge Rinaldi only fined him $250.

The other case reported by the Times involved Sal Agro, a Mafioso who was indicted for grand larceny and forgery. Agro pleaded guilty and was given a

suspended sentence by Judge Rinaldi.

Judge Rinaldi justified his leniency with Agro on the grounds that the defendant did not have a previous record. But, in fact, Agro did have a previous criminal record. On March 6, 1953, Agro was sentenced to a year in prison for his role in a heroin-selling conspiracy.

My investigation has now disclosed a fifth case where Rinaldi's judgment is in serious question. This case, like the two Mafia cases, took place in Suffolk County, where Rinaldi sits six months a year, even though he was elected in Brooklyn.

Richard Di Napoli, a former assemblyman, was the Recreation Commissioner for the town of Babylon, when he was indicted for grand larceny of political funds. He won several adjournments, and finally arranged for a non-jury trial before Judge Rinaldi in October 1970. Rinaldi acquitted Di Napoli.

Last week an assistant Suffolk County district attorney talked (not for attribution) about Judge Rinaldi:

"The Vario and Agro cases still stink. And we still believe Rinaldi's not guilty decision in the Di Napoli case was bad. We did not follow Judge Rinaldi's logic. We had a good, strong case against Di Napoli. . . . A lot of mob guys just stall their cases and wait for Rinaldi to come out here in June, and then he goes easy on them. We wish he would stay in Brooklyn. He comes out here and does things no local judge would dare do. It's a bad situation, but we can't do anything about it."

Judge Rinaldi gets paid $50 a day extra—above his $41,000 salary—by the taxpayers to sit in Suffolk County, when the assignment is actually a favor to him because of a home he owns near Islip.

Judge Rinaldi is up for re-election in 1974.

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Last week I talked to a federal prosecutor, one of several law enforcement officials currently investigating the criminal justice system in New York City.

"Brooklyn is the worst," he said, "a special case for several reasons. One, the mob has always had deep roots in Brooklyn the Gallos, Colombos, and the Gambino family particularly. Second, as the Knapp hearings showed, there is a long history of police corruption in Brooklyn. Third, the Brooklyn Bar Association is really venal, and has never helped in keeping the courts clean. And fourth, there is no tradition in Brooklyn of keeping politics out of the courts. The machine gets most of its patronage from the courts. Personally, as a prosecutor, I will not take an organized crime case into Brooklyn Supreme Court. There are too many contract judges there. Carlo Gambino can probably influence more judges there than the D. A.'s office."

In fairness, it should be pointed out there are also some excellent Supreme Court judges in Brooklyn. Irwin Brownstein, a protege of County Leader Meade Esposito, is remarkable for his knowledge of the law and his commitment to equal justice. Brownstein has taken defendants to his own home for dinner, and has spent hours of his own time trying to find jobs for paroled first offenders and ex-cons. Abe Kalina, Vincent Damiani, and Tom Jones are also highly qualified Brooklyn Supreme Court judges.

* * *

The problem in Brooklyn is not one or two individual villains, but the whole rotten, century-old system that mixes clubhouse politics and patronage with the majesty of the Constitution and the dignity of the law.

There are 46 Supreme Court judges, each serving 14-year terms, in the Brooklyn-Staten Island Judicial District. All but four were elected with the endorsement of both the Democratic and Republican parties. And more than half—including Rinaldi and Corso—were elected with the endorsement of three political parties.

The public never had a real voice in their election. And the legal profession never had a real voice in their nomination. They were all nominated in judicial conventions, tightly controlled by district leaders. And elected in deals between party leaders that guarantee no opposition. They are politicians picked for political reasons. They owe everything to the political organization. Legal excellence or distinction have little to do with the entire process. They can't even pick their own staff—the party organization does that.

In 1971, two Supreme Court judges were elected in Brooklyn, and both had Democratic and Republican support. In 1970, six Supreme Court judgeships were open in Brooklyn. Five Democrats and one Republican were picked, and all six had bi-partisan endorsement—and no serious opposition. In 1968, in the Brooklyn-Staten Island judicial district, 19 new judgeships were available, and all 19 candidates received the endorsement of the Democratic, Republican and Liberal parties.

There are $1 million worth of patronage jobs in the Brooklyn courts, and many of these jobs are controlled by a 66-year-old mortician named James Mangano. Mangano has been a district leader in Red Hook since 1934, and has been general clerk and administrative director of Brooklyn Supreme Court for two decades. He is largely responsible for both Joseph Corso and Dominic Rinaldi getting judgeships, and for his son, Guy Mangano, becoming a Supreme Court judge in Brooklyn.

It is estimated that James Mangano personally controls about 100 jobs in the Brooklyn courts—judgeships, law secretaries, confidential attendants, clerks, court reporters, court officers, probation officers, and typists. Although he never went to law school, Mangano has made about 10 of the current Supreme Court judges in Brooklyn.

Mangano is a hard-line conservative on social issues, and his Captains have quietly been working for Richard Nixon's election this autumn.

All but seven of Brooklyn's 46 Democratic district leaders hold patronage jobs, most of them

somewhere in the court system. Mangano is general clerk of Supreme Court. Frank Cunningham, Jr., the district leader of Congressman John Rooney's home club, is chief clerk of the Supreme Court's Appellate Term in Brooklyn. Casper Fasullo, another powerful district leader, is a law assistant in the Surrogate's Court. District leader Joseph Levine is a law secretary. District leader Joseph Sciarra is also a law secretary.

In addition, the *Republican* state committeemen from seven different assembly districts hold patronage jobs in the Brooklyn courts, including Joseph Parisi, chief clerk of the Criminal Court; Nicholas Nittoly, deputy clerk of the Criminal Court; and Anthony Durso, clerk of the Supreme Court.

Such a rich and political court system has traditionally been a fertile ground for corruption—whether political contracts, personal favors, or organized crime pay-offs. Maurice Nadjari, the Governor's special prosecutor, summarized the process this way: "Our judges come up through political organizations, and build up obligations along the way. At the same time, racketeers cultivate political figures, and when their people get into trouble, they try to use whatever influence they have. This influence is not going to be stopped completely until we separate justice from politics."

* * *

Meade Esposito has been county leader of Brooklyn since January 1969. Last Tuesday I had lunch with him in Foffe's Restaurant on Montague Street in Brooklyn, and asked him about the courts. He sounded like half a reformer himself.

"The whole system stinks," Esposito began. "The 14-year term for Supreme Court judges is too long. I'm for eight-year terms, and then let an impartial committee of lawyers and community people have the power to re-appoint them every two years if they're doing a good job. If not, then get rid of them. But they should be reviewed every two years."

Esposito does not favor a direct primary for Supreme Court judges, "because it would cost too much." "If there was a primary, then all the judges would be rich boys from Harvard and Yale. I like some judges to come from Brooklyn College. And in this county you would never elect a member of a minority community to the count. This way we got someone like Tom Jones on the Supreme Court. . . .

"One reform I would favor is that every judge must live in his community. In Brooklyn we got a couple Supreme Court judges who moved right out to Long Island as soon as we made them. I want my judges to be involved in the life of the neighborhood. I want them in the clubhouses, where the people can see them. Not out in Riverhead someplace."

What about the practice of the party organization picking the law secretaries? Esposito believes in that kind of patronage. "What's wrong with the party appointing the law secretaries? You gotta reward the faithful. But I make sure they work, or else they're fired."

I asked Esposito about the general low reputation of the courts, and the appointment of Maurice Nadjari as the special prosecutor.

"Yeah, I'm in favor of the superseding D. A. I know there's some decay in there. I say, let it fall wherever it falls. We have to clean it up. . . . Sure, there might be some contracts in the courts. But all this stuff about selling judgeships is a lot of crap. I defy anybody to say he gave me a dime for a judgeship."

What can you do about the bad judges?

"You prove something to me, and we'll get rid of them. There's one judge in Brooklyn Civil Court I'll tell you right now, I will oppose for re-nomination—Ross Di Lorenzo. He's bad. He was district leader and nominated himself in 1964. I will tell all my leaders to dump him in 1974."

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Each year a few good politicians deliver thoughtful speeches on the need for court reform. And then nothing happens.

In 1966, Robert Kennedy, campaigning to elect Sam Silverman the Manhattan Surrogate, briefly ignited public interest in the cause of reform. Over the years Mayor Lindsay has made several excellent speeches calling for the appointment of all judges on a merit system, based on the recommendation of impartial screening committees. For the last two years, Lindsay has also proposed the creation of a permanent commission with a full-time staff to receive and investigate lawyer and citizen complaints against judges. Board of Corrections Chairman William vanden Heuvel has also made many free speeches listing most of the things that ought to be done to redeem the courts—greater productivity, stricter supervision, less political selection, better administration.

But reasonable, polite speeches do not transform powerful, self-important institutions like the courts. The years of accumulated rot in the court system requires stronger remedies.

There is by now abundant evidence of terrible judgment, doubtful ethics, and possible corruption among some judges. The sentencing statistics collected by the Hughes Committee, the Knapp Commission report, the recent articles in the Times and The Voice, all have helped expose the essential facts of unequal justice to public scrutiny. But no one seems willing to accept responsibility for taking the next step beyond exposure.

A critical newspaper article is hardly sufficient punishment for a judge who unnecessarily sends a heroin dealer back into this city's communities of suffering. A day's embarrassment is hardly an adequate deterrent to a judge who wants to accept a contract from the Mafia, which is, after all, the General Motors of the heroin business.

The time has finally come, I think, for the courts to clean their own house, and remove judges like Dominic Rinaldi and Joseph Corso from their positions of immense power and prestige.

There are three possible mechanisms for removing judges. One is criminal indictment, which seems remote at this point, since there is no proof money changed hands in these cases.

A second possible removal mechanism is impeachment by the state legislature. This also seems unlikely.

A third way, and the most plausible, would be a trial on competency grounds by a judicial court. A judicial court can be convened by the Judicial Conference, which consists of all the Administrative Judges in the New York area. A judicial trial had been scheduled for Manhattan Supreme Court Judge Mitchell Schweitzer, when Schweitzer resigned last year.

I believe there is now a sufficient pattern of incompetent decisions by Judges Rinaldi and Corso to justify the rare spectacle of a judicial trial.

APPENDIX C

THE NEW YORK TIMES ARTICLE SEPTEMBER 25, 1972

STUDY SHOWS COURTS LENIENT WITH MAFIOSI

Racketeers Found 5 Times Less Likely To Be Convicted in State Than Others

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By Nicholas Gage

On Sept. 8, 1967, Paul Vario, who is listed by the Justice Department as a captain in the Mafia family of the late Thomas Luchese, pleaded guilty before Supreme Court Justice Dominic S. Rinaldi to commercial bribery of a police officer.

Vario, whose criminal record dates back to 1925 and includes a conviction for rape, could have been given up to a year in jail. Instead, Judge Rinaldi fined him $250.

On the same day Justice Rinaldi sentenced Luis Guzman, 19 years old, up to five years at Elmira Reformatory for robbing a drugstore in Huntington, L.I.

Vario is not the only Mafioso who has fared better than ordinary defendants in New York State courts.

1,762 Cases Studied

Last year the State Joint Legislative Committee on Crime conducted a study of 1,762 cases in state courts in the years 1960 through 1969 involving organized crime figures, including Vario.

The committee, whose chairman is Senator John H. Hughes of Syracuse, found that the rate of dismissals and acquittals for racketeers was five times that of other defendants.

In New York City, 44.7 per cent of indictments against members of organized crime were dismissed by Supreme Court judges during the 10-year period. Only 11.5 per cent of indictments against all defendants were dismissed, according to the study.

In 193 instances where organized crime figures were actually convicted, the study showed that judges let the defendants off with suspended sentences or fines in 46 per cent of the cases.

A Swindle in Brooklyn

In order to determine some of the factors in the wide discrepancy between the treatment of racketeers and ordinary defendants in the courts, The New York Times during the last six weeks has investigated the handling of several of these cases as well as more recent ones that have come before state courts in the metropolitan area.

One case in which an organized crime figure fared well in court involved an imaginative swindle that netted over $1-million during a six-week period in 1963. Counterfeit checks of Mays Department Store in Brooklyn were made out to fictional suppliers of Mays at banks where swindlers had previously established accounts for the bogus suppliers.

Seven persons were indicted in the swindle on charges of grand larceny and forgery. One of the seven, Salvatore Agro, was connected to the Mafia. According to information from investigations of the principals involved in the swindle, the person who devised the scheme, Herman Witt, borrowed $30,000 from a Mafia lieutenant to start the bank accounts used to cash the counterfeit Mays checks, and Agro was assigned to look after the investment.

In 1966, all seven defendants pleaded guilty to lesser charges before Justice Rinaldi, the same judge who had fined Vario, and he sentenced six of them to prison terms. Agro, the reputed Mafioso, was given a suspended sentence by Judge Rinaldi and walked out of the courtroom a free man.

In a telephone interview last week, Justice Rinaldi, who has been on the Supreme Court, Second District, since 1962, was asked about the sentencing of both Agro and Vario.

He said he could not remember the Vario case at all, which came before him while he was sitting in Suffolk County rather than in Brooklyn, his regular assignment. "I must have handled 200 cases for them out there that year," he said. "I don't remember any of them."

Agro Case Remembered

The judge said he did remember the Agro case. "There were several defendants in that one and I gave all of them but Agro time," he said. "His charge was reduced to a misdemeanor, which the prosecution went along with, and the probation report showed no previous record for him."

The assistant district attorney in charge of the case, Edward Panzarella, apparently concurred with the judge's decision. He later signed a report saying that the pleas "in each instance are recommended and the sentence will in all respects be adequate."

He said in the report that Agro was "the least culpable" of the defendants. "Salvatore Agro is 38 years old and has no prior record," Mr. Panzarella wrote.

However, during the police investigation of the case, detectives taped conversations between Witt, who devised the swindle, and Agro. In those tapes, which were made available to Mr. Panzarella, Agro stated that he was fully involved in the swindle and that he was close to leading Mafiosi in New York.

"First of all, the people, the big people in New York, knew about this score, the Mays score . . . ." Agro told Witt in one of the tapes "They financed—gave me the money—for this [obscenity] thing."

Moreover, The Times discovered in the course of its investigation that, contrary to what Mr. Panzarella said in his report, Agro did have a previous record.

The files of the Federal courthouse in Buffalo show that on March 6, 1953, Agro pleaded guilty to conspiracy to deal in narcotics and received a year's sentence.

Mr. Panzarella is no longer with the Brooklyn District Attorney's office. He resigned after it was disclosed that he had failed to prosecute a city correction officer arrested with more than $200,000 worth of cocaine. He could not be reached for comment.

The Agro case illustrates that in some instances lenient treatment given organized-crime fighters by a judge is approved by the prosecutor involved. But even when the prosecutor resists such treatment, racketeers can wind up doing very well in the courts.

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